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Munawar Ahmad Anees v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPLICATION NO 07–4 OF 2009(W)

B ARIFIN ZAKARIA CJ (MALAYA), MOHD GHAZALI AND RAUS SHARIF FCJJ

28 DECEMBER 2009

C *Civil Procedure — Jurisdiction — Federal Court — Federal Court declined to hear appeal in criminal matter originating from sessions court — Whether Federal Court may deal with merits of appeal after declining jurisdiction — Whether Federal Court may express view or opinion on matters submitted by*

D *parties despite lack of jurisdiction*

Civil Procedure — Jurisdiction — Federal Court — Inherent powers under r 137 of the Rules of the Federal Court 1995 — Whether inherent power could be invoked to expunge part of judgment

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Constitutional Law — Courts — Federal Court — Inherent powers under r 137 of the Rules of the Federal Court 1995 — Whether inherent power could be invoked to expunge part of judgment

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The applicant was charged at the sessions court for an offence under s 377D of the Penal Code. The applicant pleaded guilty to the charge and was convicted and sentenced. The applicant then filed a notice of appeal in the High Court which was later dismissed on the basis of the applicant's absence. The applicant's appeal to the Court of Appeal was also dismissed. The applicant then applied to the Federal Court for a review of the decision of the Court of Appeal under r 137 of the Rules of the Federal Court ('r 137'). The Federal Court dismissed the application holding that the court lacked the jurisdiction to hear the matter since the matter had originated from a subordinate court. The applicant thereafter filed a review application in the Court of Appeal for the Court of Appeal to review its decision. This application was also dismissed by the Court of Appeal. The applicant claimed that the ground for dismissal of the review application by the Court of Appeal was that the judgment of the Federal Court had made a determination on the merits of the case. Thus, the Court of Appeal applying the doctrine of judicial precedent dismissed the applicant's review application. The applicant thus moved the Federal Court to invoke its inherent powers under r 137 to expunge paras 20–26 of the judgment of the Federal Court ('the impugned judgment'). It was argued that once the Federal Court had ruled it was not

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seized of the jurisdiction, it was thereafter coram non judice and precluded from considering the merits of the matter.

Held, dismissing the application:

(1) Rule 137 cannot be construed as to confer any new jurisdiction to the existing jurisdiction of the Federal Court as spelt out under the Federal Constitution, the Courts of Judicature Act 1964 or other statutes. It merely restates that the Federal Court has the inherent jurisdiction to make any order to prevent injustice or abuse of power. In very limited and exceptional cases, the Federal Court has the inherent jurisdiction to review its own decision (see para 13).

(2) The inherent jurisdiction of the Federal Court may be exercised where: (i) there is a lack of quorum; (ii) the decision has been obtained by fraud or suppression of material evidence; (iii) there is a clear infringement of statutory law eg where the court has mistakenly applied a repealed law. But where it is a matter of interpretation or application of the law, it is not a suitable case for review; (iv) the application for review has not been heard by the court but, through no fault of the applicant, an order was inadvertently made as it has been heard; (v) bias has been established. None of the above could fit into the facts of the present case (see paras 14–15).

(3) In a criminal matter which originated from the sessions court, as in this case, the Court of Appeal stands as the apex court. No further appeal shall lie to the Federal Court. The Federal Court had thus ruled that it could not deal with the matter for want of jurisdiction. Surely, after declining jurisdiction, the Federal Court could not now assume jurisdiction. The matter had come to an end (see para 16).

(4) What was said by the Federal Court in paras 20–26 of the impugned judgment were not something that the court plucked from thin air. It was clear that what was said by the court in paras 20–26 was in relation to something which was argued by the parties. Submissions on the merits of the case were made by the parties. Hence, there was nothing wrong for the court to express its view or opinion on the matters submitted before the court (see para 17).

[Bahasa Malaysia summary

Pemohon dituduh di mahkamah sesyen bagi kesalahan di bawah s 377D Kanun Keseksaan. Pemohon mengaku salah terhadap tuduhan tersebut dan disabitkan dan dihukum. Pemohon kemudiannya memfailkan suatu notis rayuan ke Mahkamah Tinggi yang kemudiannya ditolak atas alasan ketidakhadiran pemohon. Rayuan pemohon ke Mahkamah Rayuan juga ditolak. Pemohon kemudiannya memohon ke Mahkamah Persekutuan untuk suatu semakan bagi keputusan Mahkamah Rayuan di bawah k 137

Kaedah-Kaedah Mahkamah Persekutuan 1995 ('k 137'). Mahkamah Persekutuan menolak permohonan tersebut dan memutuskan bahawa mahkamah tiada bidang kuasa untuk mendengar perkara tersebut memandangkan perkara itu bermula dari mahkamah rendah. Pemohon kemudiannya memfailkan suatu permohonan semakan di Mahkamah Rayuan untuk Mahkamah Rayuan menyemak keputusannya. Permohonan ini juga ditolak oleh Mahkamah Rayuan. Pemohon menyatakan bahawa alasan untuk penolakan permohonan semakan oleh Mahkamah Rayuan adalah bahawa penghakiman Mahkamah Persekutuan telah memutuskan atas merit kes tersebut. Oleh itu, Mahkamah Rayuan dalam menggunapakai doktrin kehakiman duluan menolak permohonan semakan pemohon. Maka, pemohon meminta Mahkamah Persekutuan menggunakan kuasa sedia adanya di bawah k 137 untuk memotong perenggan 20–26 penghakiman Mahkamah Persekutuan ('penghakiman yang dipersoalkan'). Dihujahkan bahawa apabila Mahkamah Persekutuan telah membuat keputusan bahawa bidang kuasanya tidak dirampas, maka ia coram non judice dan tidak boleh mempertimbangkan merit perkara tersebut.

Diputuskan, menolak permohonan:

(1) Kaedah 137 tidak boleh ditafsirkan sebagai memberi bidang kuasa baru kepada bidang kuasa Mahkamah Persekutuan yang sedia ada seperti yang telah dinyatakan dalam Perlembagaan Persekutuan, Akta Mahkamah Kehakiman 1964 atau statut lain. Kaedah tersebut hanyalah mengulangi bahawa Mahkamah Persekutuan mempunyai bidang kuasa sedia ada untuk membuat sebarang perintah bagi mengelakkan ketidakadilan atau salah guna kuasa. Dalam kes-kes yang terhad dan luar biasa, Mahkamah Persekutuan mempunyai bidang kuasa sedia ada untuk menyemak keputusannya (lihat perenggan 13).

(2) Kuasa sedia ada Mahkamah Persekutuan boleh dilaksanakan apabila: (i) tiada korum; (ii) keputusan dibuat berdasarkan fraud atau keterangan material disembunyikan; (iii) jelas terdapat pelanggaran undang-undang statutori, contohnya apabila mahkamah dengan silap menggunapakai undang-undang yang dimansuhkan. Tetapi, apabila ia berkenaan pentafsiran atau penggunaan undang-undang, tidak sesuai untuk disemak; (iv) permohonan untuk semakan tidak didengar di mahkamah, tetapi, tanpa apa-apa kesilapan di pihak pemohon, suatu perintah telah dibuat seolah-olah perkara tersebut telah didengar; (v) berat sebelah telah dibuktikan. Tiada satu yang telah disebut di atas merupakan fakta-fakta dalam kes ini (lihat perenggan 14–15).

(3) Dalam suatu hal jenayah yang bermula di mahkamah sesyen, seperti kes ini, Mahkamah Rayuan merupakan mahkamah tertinggi. Tiada rayuan lanjut harus sampai ke Mahkamah Persekutuan. Mahkamah Persekutuan telahpun memutuskan bahawa ia tidak boleh menangani

perkara tersebut kerana tiada bidang kuasa. Sudah tentunya apabila mengatakan bahawa ia tiada bidang kuasa, kini ia tidak harus mempunyai bidang kuasa. Perkara tersebut haruslah mempunyai pengakhiran (lihat perenggan 16).

(4) Apa yang dikatakan oleh Mahkamah Persekutuan dalam perenggan 20–26 dalam penghakiman yang dipersoalkan bukanlah sesuatu yang dinyatakan oleh mahkamah sesuka hati. Adalah jelas bahawa apa yang dinyatakan adalah berkaitan sesuatu yang dihujahkan oleh pihak-pihak. Hujahan atas merit kes dibuat oleh pihak-pihak. Maka, tidak salah bagi mahkamah menyatakan pendapat atau pandangannya atas hal-hal yang dihujahkan di hadapan mahkamah (lihat perenggan 17).]

Notes

For cases on Federal Court, see 3 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1958–1961.

For cases on jurisdiction of the Federal Court, see 2 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4411–4415.

Cases referred to

Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor [2008] 3 MLJ 771; [2008] 5 CLJ 1, FC (refd)

Adorna Properties Sdn Bhd v Kobchai Sosothikul [2006] 1 MLJ 417; [2005] 1 CLJ 565, FC (refd)

Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 2 MLJ 137; [2008] 6 CLJ 1, FC (refd)

Badan Peguam Negara v Kerajaan Malaysia [2009] 2 MLJ 161; [2009] 1 CLJ 833, FC (refd)

Chia Yan Tek & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1; [2001] 4 CLJ 61, FC (distd)

Chu Tak Fai v Public Prosecutor [2007] 1 MLJ 201; [2006] 4 CLJ 931, FC (refd)

MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun [2002] 2 MLJ 673; [2002] 3 CLJ 577, FC (distd)

Ong Thye Peng v Loo Choo Teng & Ors [2009] 4 MLJ 472; [2009] 4 CLJ 515, FC (refd)

Raja Prithwi Chand Lal Choudhury v Sukhraj Rai and Ors AIR 1941 FC 1 (distd)

Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim [2008] 3 MLJ 753; [2008] 5 CLJ 201, FC (refd)

Taylor & Anor v Lawrence & Anor [2002] 2 All ER 353, CA (distd)

Legislation referred to

Courts of Judicature Act 1964 s 87

Criminal Procedure Code s 313(2)

A Federal Constitution
Penal Code s 377D
Rules of the Federal Court 1995 r 137

Appeal from: Criminal Review W-09–31–03 of 2008 (Court of Appeal, B Putrajaya)

Manjeet Singh Dhillon (V Mugunthan with him) (Muhammad, Ganesan & Nazri) for the appellant.
Awang Armadajaya Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

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Raus Sharif FCJ (delivering judgment of the court):

[1] This is an application by the applicant moving this court to invoke its D inherent powers under r 137 of the Rules of the Federal Court 1995 ('RFC') to expunge paras 20–26 of the judgment of this court, in Criminal Application No 07–4 of 2007(W) dated 17 December 2008 ('impugned judgment') or in the alternative to make a declaratory order that all the comments in the said paragraphs as obiter dicta and hence not binding.

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[2] We heard this application on 3 November 2009. Having heard the parties we adjourned the matter for our consideration and decision. We now give our decision and the reasons for the same.

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[3] The events leading to this application are these. The applicant was charged at the sessions court for an offence under s 377D of the Penal Code. On 19 September 1998, the applicant pleaded guilty to the charge. He was convicted and sentenced to six months imprisonment with effect from the G date of arrest.

[4] On 29 September 1998, the applicant filed a notice of appeal in the High Court in Criminal Appeal No 42–44 of 1998 against the decision of the sessions court. However, the appellant failed to appear personally in the High H Court on several occasions, and the hearing of the appeal had to be repeatedly postponed. On 29 September 2003, the learned High Court judge in exercising his powers under s 313(2) of the Criminal Procedure Code ('CPC') dismissed the appeal on the basis of the absence of the applicant.

I **[5]** On 11 September 2003, the applicant filed a notice of appeal to the Court of Appeal, Appeal No W-09–31 of 2003 against the decision of the High Court. On 30 October 2007, the Court of Appeal dismissed the appeal.

[6] The applicant then made an application to this court in Criminal Application No 07–4of 2009(W) for a review of the decision of the Court of Appeal under r 137 of the RFC. On 17 December 2008, this court dismissed the application. It was held that this court lacked the jurisdiction to hear the matter since the matter had originated from a subordinate court.

[7] The applicant thereafter filed a review application in the Court of Appeal for the Court of Appeal to review its decision of 30 October 2008. The application was heard and dismissed by the Court of Appeal on 12 August 2009.

[8] It is the contention of the applicant that the grounds of dismissal of the review application by the Court of Appeal were that the impugned judgment had made a determination on the merits of the case. Thus, the Court of Appeal applying the doctrine of judicial precedent dismissed the applicant's review application. It is for this reason the applicant is coming back to this court to have paras 20–26 of the impugned judgment to be expunged or in the alternative, to declare that all comments contained in paras 20–26 as obiter dicta and hence not binding.

[9] For ease of reference, we reproduced paras 20–26 of the impugned judgment which reads as follows:

> [20] Learned counsel for the applicant in his submission before this court had also argued at great length on the scope of s 313(2) of the CPC and on the constitutional right of a litigant to a right of hearing. It was contended for the applicant that both the High Court and the Court of Appeal in the present case had erred in the failure to properly consider and apply s 313(2) of the CPC. Simply for this reason to ascertain whether in fact the High Court and the Court of Appeal had erred, we would take the liberty here to deal with this issue, notwithstanding that we had earlier ruled that this court does not have the jurisdiction to hear the plaintiff's application under r 137 of the RFC.
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> [21] Section 313(2) of the CPC in so far as it applies to the instant matter provides:
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> (1) …
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> (2) If the appellant does not appear to support his appeal the Court may consider his appeal and make such order thereon as it thinks fit:
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> Provided that the Court may refuse to consider the appeal or to make any such order in the case of an appellant who is out of the jurisdiction …, except on such terms as it thinks fit to impose.
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> [22] It is the submission of learned counsel for the applicant that even if the applicant as the appellant is absent, the court can consider an appeal and

that to consider an appeal it must mean to consider it on its merits. It is the contention made on behalf of the applicant that the court has no power to arbitrarily dismiss an appeal without considering it on merits, but if the absent appellant is out of jurisdiction then the court can refuse to consider the appeal unless and until the absent appellant complies with such terms the court has seen fit to impose. Learned counsel for the applicant also submitted to us that the prayer of the applicant is not to set aside the conviction but to allow him the opportunity of having his appeal argued on its merits in the High Court.

[23] Again, we could not agree with the submission made on behalf of the applicant on the interpretation of the scope of s 313(2) of the CPC and its application to the present case. We are of the view that the learned judge of the High Court had carefully considered the scope and application of s 313(2) of the CPC in his well written judgment. The learned judge had stated in his judgment amongst others the reason why he had to dismiss the applicant's appeal without hearing its merits. The learned judge was of the view that since the applicant had failed to appear personally in court for his appeal to be heard on several occasions whereby the hearing of the appeal had to be repeatedly postponed, this would be a ground to justify the dismissal of the applicant's appeal. On this point the learned judge cited the case of *Hayati bte Aizan v Public Prosecutor* [2000] 1 MLJ 359; [1999] 4 CLJ 697 in which His Lordship Augustine Paul J (as he then was) had this to say:

> In the appeal before me the appellant had failed to appear personally in court on five occasions in pursuance of a condition upon which she was admitted to bail. It would be an abuse of the process of the court to adjourn the hearing of the appeal any further. I was therefore of the view that the discretion must be exercised in favour of the application made by the prosecution to dismiss the appeal. Thus I dismissed the appeal.

[24] The learned judge of the High Court also discussed on what would be the resultant effect of the hearing of the applicant's appeal in his absence and the powers vested in the court at the hearing of an appeal. The learned judge took into consideration of the fact that the applicant is out of jurisdiction (for being outside the country) and the court having the revisionary powers on appeal to impose a heavier sentence if the court finds the six months imprisonment meted out on the applicant is manifestly inadequate even though the public prosecutor did not appeal against the sentence. It is for this reason that the learned judge concluded that it was incorrect for learned counsel for the applicant to contend that just because the applicant had gone through the trial process before the sessions court and had served his sentence that he did not have to appear. The learned judge anticipated the possibility of enhancing the sentence passed on the applicant but the powers to enhance the sentence cannot be carried out in the absence of the applicant as he has the right to be heard. To the court the presence of the applicant at the hearing of the appeal is of paramount importance, but for his repeated absence it would be justified for the court to exercise its discretion to dismiss the appeal without considering its merits.

[25] Finally, it is noted that in dismissing the appeal the learned judge of the High Court had given due consideration to the fact that the appeal by the applicant was in relation to the applicant's conviction and sentence upon his own plea of guilt under s 305 of the CPC. Under the said provision of s 305 of the CPC the applicant cannot appeal against the conviction except as to the extent or legality of the sentence. Having referred to the procedure and principles of law as laid down in the Supreme Court's case of *Lee Weng Tuck & Anor v Public Prosecutor* [1989] 2 MLJ 143; [1989] 2 CLJ 120; [1989] 1 CLJ (Rep) 75 the learned judge found that the recording of the plea of guilt made by the applicant was in order and according to law. From the records of appeal available before him there was nothing to show that the proceedings before the sessions court where the applicant had pleaded guilty was conducted not in accordance with the procedure and principles laid down in *Lee Weng Tuck*'s case.

[26] For the reasons above stated we are in agreement with the conclusion arrived by the learned judge of the High Court that to allow the hearing of the appeal of the applicant in his absence would tantamount to an abuse of the process of the court. In the exercise of the discretionary power under s 313(2) of the CPC the learned judge was therefore justified in refusing to consider the appeal and in dismissing the appeal.

[10] Mr Manjeet Singh Dhillon, learned counsel for the applicant submitted that the above paras 20–26 ought to be expunged. He argued that once this court had ruled it was not seized of jurisdiction, it was thereafter coram non judice and precluded from considering the merits of the matter. According to him, this court had thereafter neither the locus to rule nor comment on the merit of the case. By doing so, it had caused injustice to the applicant as the Court of Appeal in deciding the applicant's review application was referred to it and felt bound on what was said by this court.

[11] At the outset, we need to point out that what is before us is not an appeal but an application under r 137 of the RFC. Rule 137 reads:

> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[12] The principle governing the jurisdiction and exercise of the power to review under r 137 of the RFC is well settled (see *Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 MLJ 137; [2008] 6 CLJ 1, *Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2006] 1 MLJ 417; [2005] 1 CLJ 565, *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201; [2006] 4 CLJ 931, *Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor* [2008] 3 MLJ 771; [2008] 5 CLJ 1, *Sia Cheng Soon & Anor v Tengku*

Ismail bin Tengku Ibrahim [2008] 3 MLJ 753; [2008] 5 CLJ 201, *Badan Peguam Negara v Kerajaan Malaysia* [2009] 2 MLJ 161; [2009] 1 CLJ 833, *Ong Thye Peng v Loo Choo Teng & Ors* [2009] 4 MLJ 472; [2009] 4 CLJ 515).

[13] It had been pointed out in those cases that r 137 cannot be construed as to confer any new jurisdiction to the existing jurisdiction of this court as spelt out under the Federal Constitution, the Courts of Judicature Act 1964 or other statutes. It merely restated that this court has the inherent jurisdiction to make any order to prevent injustice or abuse of power. And it had been accepted that in very limited and exceptional cases, this court does have the inherent jurisdiction to review its own decision.

[14] In *Asean Security Paper Mills Sdn Bhd*, Abdul Hamid Mohamad CJ (as he then was), had listed the instances where the inherent jurisdiction of this court may be exercised. These are as follows:

(a) Where there is a lack of quarom as in *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 CLJ 61 where two of the presiding judges had retired at the time when the judgment was delivered and only one judge remaining who was capable of exercising his function as a judge of that court;

(b) Where the decision had been obtained by fraud or suppression of material evidence as in *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673; [2002] 3 CLJ 577;

(c) Where there is a clear infringement of statutory law eg where the court has mistakenly applied a repealed law. But where it is a matter of interpretation or application of the law, it is not a suitable case for review;

(d) Where the application for review has not been heard by the court but, through no fault of the applicant, an order was inadvertently made as it has been heard as in *Raja Prithwi Chand Lal Choudhury v Sukhraj Rai and Ors* AIR 1941 FC 1; and

(e) Where bias has been established as in *Taylor & Anor v Lawrence & Anor* [2002] 2 All ER 353.

[15] None of the above could fit into the facts of the present case. No doubt Abdul Hamid Mohamad CJ (as he then was) in the same case said that there may be other circumstances upon which the inherent powers could be exercised. But we do not see any circumstances in the present case which would allow us to do so.

[16] In the present case, it is not in dispute that the applicant's case originated from the sessions court. The matter came before the High Court

in its appellate capacity and not under its original jurisdiction. Section 87 of the Courts of Judicature Act 1964 provides that the Federal Court shall have jurisdiction to hear and determine any appeal from the decision of the Court of Appeal in its appellate jurisdiction in respect of any matter decided in the High Court in its original jurisdiction. In a criminal matter which originated from the sessions court, as in this case, the Court of Appeal stands as the apex court. No further appeal shall lie to the Federal Court. The appeal should stop at the Court of Appeal. That was what exactly decided by this court on 17 December 2008. This court had ruled that it could not deal with the matter for want of jurisdiction. Surely, after declining jurisdiction, this court cannot now assume jurisdiction. The matter has come to an end. It has to stop otherwise there will be no end to a litigation.

[17] In addition, we are of the view that what was said by this court in paras 20–26 of the impugned judgment were not something that this court plucked from thin air. From the impugned judgment itself, it is clear that what was said by this court in paras 20–26 was in relation to something which was argued by the parties. Submissions on the merits of the case were made by the parties. Hence, there is nothing wrong for this court to express its view or opinion on the matters submitted before the court. Whether what was said by this court in paras 20–26 is obiter dicta or a ruling, it is not for this court to determine through an application of this nature. As rightly pointed out by learned deputy public prosecutor, there should not be a declaratory order to pin point which part of a judgment is obiter or a ruling. Such determination has to be done by the skills of counsel appearing before the courts. It cannot be done by way of an application as it is being done in this case.

[18] For the above said reasons, the application must be dismissed.

Application dismissed.

Reported by Kanesh Sundrum